IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4969 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DINESHCHANDRA JAMNADAS GADHIYA - Petitioner(s)
Versus
MUKTABEN JAMNADAS RAJANI & 1 - Respondent(s)

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Appearance :

MR MEHUL S SHAH for Petitioner(s) : 1,MR SURESH M SHAH for Petitioner(s) : 1,
RULE UNSERVED for Respondent(s) : 1,
MR SUNIL L MEHTA for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 12/04/2007

ORAL JUDGMENT

1. Learned advocate Shri Suresh M. Shah for the petitioner submitted that respondent no.1 herein

has since long sold the suit premises. His absence therefore, would not be material for hearing the petition further. He therefore, sought and was granted permission to delete respondent no.1.

2. In this petition, the petitioner(here-in-after referred to as “the tenant”) has challenged legality of judgement and order dated 19th September, 2005 passed by Additional Judge, Small Cause Court, Rajkot in Civil Misc. Application No.24/1988 filed by the petitioner.

3. The case has a checkered history. Briefly stated, facts are as follows :

3.1 The tenant was occupying a part of the residential premises situated at Sheri No.9, Sardarnagar, Rajkot, in the property known as “Chiratan” (here-in-after referred to as “the suit premises”). The opponent no.1 original landlord filed rent suit no.877/79 against the tenant for eviction. Rent Court passed an ex-parte decree for eviction on 15th July, 1980. Tenant preferred appeal No.433/80 which was allowed and ex-parte decree was set aside on 14th December, 1983. During the pendency of appeal, landlord had filed execution petition no.68/80 which remained dormant.

3.2 Once again the landlord succeeded in

getting ex-parte decree on 30th April, 1984. The tenant once again appealed against the ex-parte decree by filing Civil Misc. Application No.344/84 which was allowed by the Appellate Court on 30th September, 1987 and ex-parte decree was set aside.

3.3 Though the first ex-parte order of eviction passed on 15th July, 1980 was set aside by the Appellate Court on 14th December, 1983 and that therefore, the eviction decree did not survive and that therefore, the execution application no.68/80 filed by the landlord ought to have died its natural death, upon a fresh ex-parte decree being passed on 30th April, 1984, the earlier execution petition no. 68/80 was pressed in service and the possession of the suit premises was taken away from the tenant on 25th June, 1984.

3.4 It appears that after the Appellate Court set aside the ex-parte decree by an order dated 30th September, 1987, the suit came up for hearing before the trial Court. On 29th December, 1987, the rent suit itself came to be dismissed for want of prosecution. It is not in dispute that this order was neither set aside nor recalled and till date no application has been filed by or on behalf of the landlord seeking setting side of the dismissal of the suit.

3.5 It appears that the present respondent no.2 purchased the suit premises from respondent no.1 herein sometimes in the year 2002.

3.6 The tenant in the meantime had filed Civil Misc. Application No.24/88 before the Rent Court seeking restoration of the possession which he had lost in the manner noted here-in-above. It is this application which the learned Judge dismissed by the impugned order. While rejecting the application, learned Judge placed heavy reliance on the order passed by the Appellate Court on 30th September, 1987. Operative portion of which reads as follows :

"ORDER
The present application is allowed and exparte decree passed in R.C.S. 877/79 is hereby set aside. The suit proceed from the hearing of Exh.13 of R.C.S. No.877/79.
Applicant's prayer of restoration of the possession of suit premises to he applicant is rejected."

Placing heavy reliance on the Appellate Court's order of refusal to restore the possession of suit premises to the tenant, learned Judge of the Small Causes Court, Rajkot, rejected his application for restoration of possession holding that the same is barred by constructive Res judicata and principles of estoppel.

4. Having heard learned advocates for the parties, I am unable to countenance the order passed by

the trial Court.

5. First and foremost it may be recalled that the execution application 68/80 was filed seeking to execute an ex-parte decree passed by the trial Court on 15th July, 1980. This decree was however, set aside by an order dated 14th December, 1983. Once this decree did not survive, execution application no.68/80 could not have been pressed in service to evict the tenant from the suit premises because the decree which was sought to be executed no longer survived. Secondly and most importantly as noted earlier, eventually the suit itself stood dismissed, of-course, it was dismissal for default, nevertheless, it was dismissal all the same. Admittedly, till date the suit has not been restored. In-fact no application has been filed by or on behalf of the plaintiff for restoration of suit which came to be dismissed for default on 29th December, 1987 or for recalling the said order. Once the suit is dismissed, the execution of a decree also cannot survive. On two occasions, the landlord had succeeded in securing ex-parte decree against the tenant which according to the tenant were through fraud. Be that as it may, on both occasions the ex-parte decrees were set aside and eventually the suit itself came to be dismissed. The landlord therefore, cannot hold on the possession of the suit premises which he

had secured from the tenant by way of purported execution of a decree when neither the decree survived nor the suit itself survived. The suit having been dismissed and no further steps taken to challenge such an order, the landlord cannot refuse to restore possession of the suit premises to the tenant. Thus on both counts, tenant was entitled to restoration of the possession.

6. Learned Judge materially erred in holding that the application of the tenant is barred by constructive Res judicata and principles of estoppel. The order passed by the Court while setting aside the decree was at a stage where the suit was still pending and alive. In exercise of judicial discretion and in its wisdom, Appellate Bench of the Small Causes Court found it inappropriate to put the tenant back in possession during the pendency of the suit which possession tenant had lost under a decree which of-course was ex-parte. The exercise or rather refusal to exercise discretionary power at that stage certainly cannot debar the tenant from seeking restoration of possession of suit premises once the suit itself stood dismissed.

7. Considering these aspects of the matter, impugned order dated 19th September, 2005 is found to be unsustainable and same is therefore,

set aside. Prayer for restoration of possession of the suit premises which was earlier in possession of the tenant is granted. Rule made absolute. No costs.

At the request of learned advocate for the respondent, the order shall stand stayed upto 9th May, 2007.

Direct service is permitted.

(Akil Kureshi,J.)

(raghu)